Supreme Court, U.S.
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(3)

No. 89-1819

In The

# Supreme Court of the United States

October Term, 1989

MONICA McCABE,

*Petitioner,*

v.

EUGENE A. PELIZZONI, EDWARD F. LEWIS, BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, OKLAHOMA, and JOHN F. CANTRELL, COUNTY TREASURER OF TULSA COUNTY, STATE OF OKLAHOMA,

*Respondents.*

## REPLY OF PETITIONER TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

When a Petitioner has her several minerals confiscated without actual notice, by means of an unsuccessful state court lawsuit (admitted to be wholly without merit by state government respondents), instituted by a surface claimant who had no interest in Petitioner's property, which lawsuit was properly dismissed by the court after judgment setting forth an impossible legal description, does such confiscation amount to a denial of property without due process?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

CONCLUSION ..... 7

APPENDIX ..... 1a

# TABLE OF AUTHORITIES

Page

CASES:

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) ..... 7

Wolfe v. North Carolina, 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed. 1650 (1960) ..... 7

OTHER AUTHORITIES:

28 U.S.C. §1257(a)(3) ..... 4

Okla. Stat., tit. 12 §§1031-1038 (1910-1969) ..... 6

Okla. Stat., tit. 68 §451 (1961) ..... 5

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## REPLY OF PETITIONER TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

### STATEMENT OF THE CASE

On May 21, 1990, the Petitioner filed with this Court a Petition for a Writ of Certiorari to the Court of Appeals for the State of Oklahoma, Division No. III. Simply stated, the Petition raises a substantial federal issue not decided on any adequate, substantial, or independent state grounds in any Oklahoma Court.

The Oklahoma Courts have upheld the validity of a surface owner's confiscation of property from a severed mineral owner. Charles Pearce (hereinafter Pearce) was

the surface claimant. Petitioner is the mineral owner. The confiscation purportedly took place by means of a 1978 lawsuit (the Pearce suit) rendered without actual notice to petitioner, and by misdescribing her property. The Appearance Docket reflecting all proceedings in the Pearce suit is reprinted in its entirety in Appendix A hereto, pp. 1a-5a, infra.

As this Court can quickly ascertain, the Pearce suit was no ordinary action. It was in litigation from September 29, 1978 through October 17, 1980. Then, on October 17, 1980, it was dismissed by the Court for failure to present.

The Pearce suit was dismissed by the Court, after a judgment. The Oklahoma Courts that decided Petitioner's case were aware of the dismissal. Thus far, it has been disregarded.

Despite the fact the Appearance Docket shows the Pearce suit to have been unsuccessful and therefore properly dismissed, Oklahoma Courts have declared Pearce [a surface claimant] possesses a valid judgment "taking" Petitioner's property [non-surface severed minerals].

All allegations of the Pearce suit, including allegations regarding jurisdiction of the Court to render same, were denied, previous to his unsuccessful lawsuit's dismissal. The denials are reprinted in the Appendix B hereto, pp. 6a-8a, infra. Ironically, the denials were made on January 3, 1979, by Defendants Board of County Commissioners and John F. Cantrell, County Treasurer (hereinafter state government respondents). These defendants who on January 3, 1979, admitted the Pearce suit was wholly

without merit, are the same parties as state government respondents who have now filed a Response to Petition for Writ of Certiorari. Without explanation, the state government respondents have completely changed their position by requesting this Court to uphold the validity of the Pearce suit.

Beyond that, it is unclear what standing the state government respondents have in this Court (as public authorities funded by taxpayer's money) to recant their previous denial of all allegations of a private-party lawsuit, resulting in the illegal confiscation of Petitioner's property.

The Courts below that decided Petitioner's case were aware of the denials by state government respondents. Thus far, the denials have been brushed aside.

Petitioner properly insisted to each Oklahoma Court that heard her case, she had been denied her property without due process of law in violation of the 14th Amendment to the United States Constitution. Nonetheless, the state government respondents deceptively claim in their Response on p. 11, that "Petitioner never raised any federal issues below." They say this despite the fact that Appendices G and H to Petitioner's Petition for a Writ of Certiorari filed on May 21, 1990, clearly show the federal issue of denial of due process to have been raised on more than one occasion.

Interestingly the Court of Appeals for the State of Oklahoma, Division No. III, apparently passing on the Fourteenth Amendment federal due process question, conceded that considering Petitioner's "evidence of lack of notice to the severed mineral interest owners, it would

appear that Appellant's [Petitioner's] allegation of error is well-taken." See p. 4a of Appendix A to Petitioner's Petition for a Writ of Certiorari. Despite this, state government respondents inappropriately insist in their Response (p. 13) that this case "does not present a final state court decision on a federal question, and thus this Court is without jurisdiction."

Because notice has always been synonomous with due process, Petitioner submits that a substantial federal issue was in fact decided, and jurisdiction exists in this Court to declare the confiscation of her property without proper notice an unprecedented denial of her Constitutional rights.

Simply stated, this Court represents a forum of last resort to rectify a wrong repugnant to every notion of fundamental fairness imaginable.

## ARGUMENT

Jurisdiction exists in this Court to declare the Pearce suit a flagrant denial of Petitioner's property in violation of due process required under the Fourteenth Amendment to the United States Constitution. 28 U.S.C. § 1257(a)(3) states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties,

> or laws of the United States, *or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution* or the treaties or statutes of, or any commission held or authority exercised under, the United States. (Emphasis added)

Pearce never owned Petitioner's severed minerals. Pearce never had any claim to Petitioner's property. Pearce admittedly never gave notice to Petitioner, as required under Oklahoma Law [Okla. Stat., tit. 68 § 451 (1961)] and demanded by federal constitutional law, to acquire a valid certificate tax deed to Petitioner's property.

Pearce never acquired a valid judgment against Petitioner because his unsuccessful lawsuit was dismissed, and the property he sued for was misdescribed. Despite this, Oklahoma Courts have seen fit to award Petitioner's property to Pearce. The effect of this confiscation, unsupportable by any factual or legal basis, is to formulate a novel, special and unparalleled rule of law: a property owner is subject to losing their property if an unsuccessful, dismissed lawsuit is filed against them.

An inadequate and unsupported basis the Oklahoma Courts have attempted to use to uphold the Pearce suit is collateral estoppel. Oklahoma Courts have decided that since Pearce supposedly litigated title to Petitioner's property once (in the Pearce suit), Petitioner is precluded from re-litigating the issue. That does not make sense to Petitioner, and should not make sense to this Court, because Pearce never litigated title to Petitioner's property. Consequently, his lawsuit was dismissed by the Court.

Under Oklahoma law the statute of limitations for vacating the dismissal of Pearce's lawsuit has expired. Okla. Stat., Tit. 12 §§ 1031-1038 (1910-1969) The dismissal stands. There is no legal authority that a dismissed lawsuit can be transformed into a valid judgment.

The Oklahoma Courts have failed to address the non-vacatable dismissal, because common sense dictates that an unsuccessful, dismissed lawsuit cannot possibly support a valid judgment.

Another inadequate and unsupported basis for validating the Pearce judgment, according to Oklahoma courts, has been to approve a misdescription of the property Pearce sued for throughout his dismissed suit. To the knowledge of Petitioner there is no authority holding that a misdescription of property in a publication notice in a suit to adjudicate title can support a valid judgment. To condone such a misdescription is unheard-of in the history of American Jurisprudence.

Jurisdiction must exist to declare as a denial of due process an admittedly dismissed lawsuit as the only evidence being asserted against Petitioner to deprive her of property. Otherwise every baseless suit against a property owner which failed, and was thereafter dismissed, could in fact be used to confiscate property, so long as every State court called upon to void the suit refused to consider the dismissal. At some point this Court would be obligated to declare such patently illegal and outrageous confiscations violative of the Fourteenth Amendment to the United States Consititution. That time has come. Petitioner has never been afforded any opportunity to defend against the confiscation of her property. See

*Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

In each Oklahoma Court below, Petitioner has claimed, thus to no avail, a denial of her property without due process, violative of the Fourteenth Amendment to the United States Constitution.

Appendix C, pp. 9a-20a, infra, is a complete transcript of the decision of the Oklahoma Trial Court. In this transcript state government respondents admit they have no interest in this case. However, they seek to defend Pearce's title, for reasons unexplained. Further, Appendix C reveals the constitutional issue was specifically brought to the attention of the Oklahoma Trial Court, and that the Court refused to consider it. Petitioner refers this Court to *Wolfe v. North Carolina*, 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed. 1650 (1960) wherein this Court stated:

> "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this court by putting forward nonfederal grounds of decision which are without any fair or substantial support."

## CONCLUSION

Petitioner has properly brought before this Court a series of corrupt legal maneuvers by Pearce coupled with unsupportable Oklahoma Court decisions that distort every conception of due process imaginable. This case presents much more than exceptional circumstances. It represents an unequalled and unconscionable disregard of property rights with far reaching consequences.

The only judgment the unsuccessful, dismissed Pearce suit can support is one of dismissal, and Oklahoma Courts have been refusing to recognize that as Petitioner is concerned.

Petitioner requests this Court grant certiorari, or in the alternative vacate the Memorandum Opinion of the Court of Appeals for the State of Oklahoma, Division No. III and remand for further proceedings and guidance, in harmony with the Fourteenth Amendment of the United States constitution.

RONALD BERNBAUM
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Tulsa, Oklahoma 74105
(918) 742-0232
*Counsel for Petitioner*

| No. | Title Of Cause | Nature Of Action | Attorneys | |
|---|---|---|---|---|
| | Charles Pearce, | | John W. Hampton | Plaintiff |
| | vs. | | | |
| | Board of County Commissioners, Tulsa County, Okla., John F. Cantrell, County Treasurer of Tulsa County, Okla., & Monica L. Sharum, W.M. Dunn, Mrs. Winona Wines, Wilford E. Wines, Gulf Oil Corp., A.J. Geiger, & A.N. Edwards, Et Al, | Quiet Title | | Defendant |

APPENDIX A

| Date | | Clerk's Costs | Sheriff Costs | Misc. Fees | Dis-burse-ments | Credits | Bal-ance |
|---|---|---|---|---|---|---|---|
| 9-29-78 | File Petition | | | | | | |
| Sep 29 78 | 223,637 RECD John W. Hampton Cost CK | | | | | 50.00 | 50.00 |
| Sep 29 78 | | 34.00 | | 3.00 | | | 10.00 |
| | | | | 3.00 | | | |
| Oct 2 78 | Report | 34.00 | .00 | 6.00 | 40.00 | | 10.00 |
| Sep 29 78 | File Notice By Publication L.N. | | | | | | |
| Sep 29 78 | File AFFI To Obtain Ser By Publication | | | | | | |
| Sep 29 78 | File AFFI In Lieu Of Mailing Notice And Petition | | | | | | 10.00 |

| Date | Continued | Clerk's Costs | Sheriff Costs | Misc. Fees | Dis-burse-ments | Credits | Bal-ance |
|---|---|---|---|---|---|---|---|
| Oct 3 78 | File Ret Summons Ser Bd Co Cmmrs By Ser Co Clk Oct 2 Ser John F. Cantrell Co Treas Oct 2 | | 7.00 | | | | |
| Oct 3 78 | File Summons Cert Mail To Corp Co Report | 3.00 | | | | | |
| Illegible | Report | 3.00 | 7.00 | 0.00 | 10.00 | | 0.00 |
| Oct 5 78 | File Ret Cert Mail Rec Del Corp Co Oct 4 | | | | | | .00 |
| Oct 19 78 | File Proof Of Publ LN | | | 91.20 | | | 91.20 |
| Oct 26 78 | File Entry Of Appearance By Deft Gulf Oil Corp. Michael C. Smith Atty | | | | | | 91.20 |
| Nov 6 78 | File Disclaimer Of Gulf Oil Corp | | | | | | 91.20 |

| Date | Continued | Clerk's Costs | Sheriff Costs | Misc. Fees | Dis-burse-ments | Credits | Bal-ance |
|---|---|---|---|---|---|---|---|
| Dec 4 78 | 229,067 RECD John W. Hampton Cost CK | | | | | 91.20 | .00 |
| Dec 6 78 | 80,829 Paid Tulsa Daily Legal News Pub | | | 91.20 | | | .00 |
| 12-4-78 | JE of judgt per JE BEASLEY | | | | | | |
| Dec 4 78 | File J E Of JDGT | | | | | | .00 |
| Dec 4 78 | File Disclaimer By Deft Wilford E. Wines | | | | | | .00 |
| Dec 20 78 | File Order Of Transfer Or Reassignment To Judge Comfort | | | | | | .00 |
| Jan 3 79 | File ANS Of Co Treas | | | | | | .00 |

| Date | Continued | Clerk's Costs | Sheriff Costs | Misc. Fees | Dis-burse-ments | Credits | Bal-ance |
|---|---|---|---|---|---|---|---|
| Jan 3 79 | File ANS Of Defts BD Of Co Comm | | | | | | .00 |
| 1-3-79 | LV granted to file out of time RICKETTS | | | | | | |
| 10-1-80 | Set for disposition docket on 10-17-80 @9:00 Comfort | | | | | | |
| 10-17-80 | Dismissed for Failure to present. Comfort | | | | | | |

## APPENDIX B

IN AND FOR THE DISTRICT COURT OF
TULSA COUNTY STATE OF OKLAHOMA

| | | |
|---|---|---|
| CHARLES PEARCE,<br>Plaintiff,<br>v.s.<br>BOARD OF COUNTY COMMISSIONERS, et al.,<br>Defendants. | ) | NO. C-78-2116<br>FILED<br>JAN 3 1979 |

ANSWER OF DEFENDANTS, BOARD OF COUNTY COMMISSIONERS

The Board of County Commissioners of Tulsa County, Oklahoma, Defendant herein, for its Answer to the Petition of the Plaintiffs, alleges and states, that it denies each and every allegation contained therein.

WHEREFORE, having fully answered, this Defendant prays that Plaintiffs take nothing as against it by virtue of their Petition herein, but that this Defendant recover from the Plaintiffs its costs expended herein.

BOARD OF COUNTY
COMMISSIONERS OF TULSA
COUNTY, OKLAHOMA,

BY: /s/ Deryl L. Gotcher, Jr.
ASSISTANT DISTRICT
ATTORNEY

Leave granted to file this 3rd day
of January, 1979.

/s/ Ronald Ricketts
DISTRICT JUDGE

I, Deryl L. Gotcher, Jr., Assistant District Attorney of District 14, Tulsa County, Oklahoma, on the 3rd day of January, 1979, deposited in the United States Mail, with full postage affixed thereto, an envelope containing a full true and correct copy of the foregoing Answer to: John W. Hampton, 512 Mayo Building, Tulsa, Oklahoma 74103.

/s/ Deryl L. Gotcher Jr.
ASSISTANT DISTRICT ATTORNEY

---

IN AND FOR THE DISTRICT COURT OF TULSA COUNTY STATE OF OKLAHOMA

| | | |
|---|---|---|
| CHARLES PEARCE, Plaintiff, v.s. BOARD OF COUNTY COMMISSIONERS, et al., Defendants. | ) | NO. C-78-2116 FILED JAN 3 1979 |

ANSWER OF COUNTY TREASURER

John F. Cantrell, Tulsa County Treasurer, Defendant herein, for his Answer to the Petition of the Plaintiffs, alleges and states, that he denies each and every allegation contained therein.

WHEREFORE, having fully answered, this Defendant prays that Plaintiffs take nothing as against him by virtue

of their Petition herein, but that this Defendant recover from the Plaintiffs his costs expended herein.

JOHN F. CANTRELL,
TULSA COUNTY TREASURER

S. M. FALLIS, JR.
DISTRICT ATTORNEY

BY: /s/ Deryl L. Gotcher Jr.
ASSISTANT DISTRICT ATTORNEY

Leave granted to file this 3rd day of January, 1979.

/s/ Ronald Ricketts
DISTRICT JUDGE

I, Deryl L. Gotcher, Jr., Assistant District Attorney of District No. 14, Tulsa County, Oklahoma, on the 3rd day of January 1, 1979, deposited in the United States Mail, with full postage affixed thereto, an envelope containing a full true and correct copy of the foregoing Answer to: John W. Hampton, 512 Mayo Building, Tulsa, Oklahoma 74103.

/s/ Deryl L. Gotcher Jr.
ASSISTANT DISTRICT ATTORNEY

## APPENDIX C

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY STATE OF OKLAHOMA

| | | |
|---|---|---|
| MONICA McCABE, | ) | |
| | ) | |
| Plaintiff, | ) | CASE NO |
| -vs- | ) | CJ 85-4803 |
| | ) | |
| BOARD OF COUNTY COMMISSIONERS, et, al, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JANE P. WISEMAN

November 14, 1986

APPEARANCES

| | |
|---|---|
| FOR THE PLAINTIFF: | Pat Malloy & Ron Bernbaum<br>Attorneys at Law<br>3545 E. 51st St.<br>Tulsa, Oklahoma |
| FOR THE DEFENDANTS: | Phillip McGowan<br>Attorney at Law<br>Denver Building<br>Tulsa, Oklahoma |
| | Ms. Doris Fransein<br>Asst. District Attorney<br>Tulsa County Courthouse<br>Tulsa, Oklahoma |
| REPORTED BY: | Ms. Tonya M. Bowen<br>Cert. Shorthand Reporter<br>Tulsa County Courthouse<br>Tulsa, Oklahoma |

INDEX

PROCEEDINGS HAD IN CHAMBERS: 3

COURT REPORTER'S CERTIFICATE: 14

PROCEEDINGS

* * *

[p. 3] (the following proceedings were held in chambers)

THE COURT: This is Case Number CJ 85-4803, Monica McCabe, plaintiff, versus Board of County Commissioners, and other defendants.

This matter comes on now pursuant to the plaintiff's Motion for Summary Judgment.

The record should reflect that Mr. Bernbaum and Mr. Malloy are present here on behalf of the plaintiff. Counsel for everybody else is here too.

The record should reflect that I had received from Counsel the additional authorities that I had requested at the last hearing, I believe on the 24th of October. I requested Counsel to submit to me additional authorities in regard to the issue of the discrepency in the legal description contained in the previous proceedings in Case Number CJ 78-2116. I have received those and have had an opportunity to review those. And also to review the authorities and briefs previously submitted on the issues presented by the plaintiffs on the Motion for Summary Judgment.

It appears to the Court that having reviewed those authorities and the arguments of Counsel, that at this time the plaintiff's Motion for Summary Judgment should

be overruled. My feeling at this time is that having reviewed the matters [p. 4] presented to the Court in regard to the question of whether the judgment of December 4th, 1978 is, in fact, void. I have concluded that it is not. It appeared from the cases that I've looked at that it is incumbent upon the plaintiff to show, in order to attack that judgment, that the judgment is void. And must show that the Court at that time either lacked jurisdiction of the party or subject matter, or lacked jurisdiction to render the decision that it rendered at that time.

I have concluded in looking at the judgment rendered and also the authorities that have been cited by Counsel that the judgment is, in fact, not void. That being the only basis on which the judgment could be attacked, it's my conclusion that the plaintiff's Motion for Summary Judgment must fail.

We have also the defendant's Motion to Dismiss, which I have not really addressed since that was not formally argued previously. I don't know what affect the Court's finding in regard to the Motion for Summary Judgment has on the defendant's Motion to Dismiss.

MS. FRANSEIN: Is this the Board of County Commissioners?

THE COURT: That's correct.

MS. FRANSEIN: For the record, would you go ahead and rule. The Board of County Commissioners and the County [p. 5] Treasurer has filed disclaimers in this case. We have no interests whatsoever in this case. Also

that we are not the proper parties to be sued in a situation as in this. And we don't have material interest in their controversy. And therefore, ask that we be dismissed. And if the Court would go ahead and rule, I imagine the plaintiffs may very well appeal your decision, and –.

THE COURT: Well, I don't know that they can actually appeal. Rule 13 provides, and I think that the alternative to that is finding, in fact, that Mr. Pearce is entitled to judgment based on the ruling that the judgment is not void-upon my finding that it's not void. I also did, of course, review the issues in regard to the misdescription, and I have not concluded in looking at that and the cases cited that the property is not identifiable. My feeling is that it is, and it appears to be a typographical error. It being sufficiently described, even though there is a mistake in that description, I could not conclude that the judgment should be set aside on that basis.

MR. MALLOY: Now, I wanted to address that particular point, if I may. That we are familiar – The Court has read the cases cited by Counsel with reference to the description. Are you saying in essence that your decision relative to the description error, that the cases that were submitted by Counsel is the predicate for that ruling in that face of it?

[p. 6] THE COURT: No, sir. I looked at the authorities that you – Actually it was a letter from Mrs. McCabe rather than a letter from you all. I don't know why she sent that, I really was a little bit surprised when I saw that she had sent this. I don't know if she prepared it or not. Did she?

MR. MALLOY: I didn't prepare it.

THE COURT: Mr. Bernbaum, the letter from her filed November the 7th, was that prepared by her or you?

MR. BERNBAUM: Prepared by both of us.

THE COURT: In any event, that is not the only basis for it. I did review those authorities in reaching my conclusion. But, I think the cases indicate that if the property can be sufficiently identified, that simply because there's an error in the description is not sufficient.

MR. MALLOY: Okay.

THE COURT: To make a ruling that the judgment, based on that description, is void.

MR. MALLOY: You were aware of the fact, the reason I'm asking you about these citations, none of these cases were cited to you relative to descriptions had anything to do with a missed description of this nature. In all of those cases they were talking about interpretation of deeds and –.

THE COURT: I was aware of that.

MR. MALLOY: And you didn't get into the constitutional question of whether or not someone can possibly get notice [p. 7] when the description is, in part, four miles away. In other words, the cases they cited really, in our opinion, were not pertinent to the issue here with respect to a description such as this. Which is not only, as we said to you in the argument and in the briefs, not only inconsistent, but contradictory in a notice in the complaint petition, and in the notice and in the judgment.

Those cases, in our judgement, cannot possibly be pertinent to the circumstances of this case unless – I was, in the event we do have to appeal this thing, wanting to find out if there's something else other than those cases that you made that ruling that this description in this notice was not, in fact, a deprivation of due process of law.

THE COURT: I think I understand that, sir. I think the real question here is whether a person could fairly ascertain what the property is from looking at the description.

MR. MALLOY: Okay.

THE COURT: I think looking at that description that you can tell what the property is.

MR. MALLOY: Okay.

THE COURT: I think it does, in fact, adequately identify what the property is. And that I thought was the issue that was presented. So, I understand that the cases that they cite had to do with deeds rather than questions of descriptions in regard to lawsuits that were pertaining to notice.

[p. 8] MR. MALLOY: And notices and due process.

THE COURT: I understand that.

MR. MALLOY: Okay, all right.

THE COURT: So, I am aware of the distinction and that did not go unnoticed.

MR. McGOWAN: You do have one more pending motion that is on our Motion for –.

THE COURT: I think there was. I looked back through the file and realized that this had been filed. I wasn't sure whether it had been ruled on.

MR. McGOWAN: No, Your Honor, it has not.

THE COURT: Can I go back to one issue here that I don't think–?

MR. McGOWAN: Yes, you may.

THE COURT: In regard to the question of Plaintiff's Motion for Summary Judgment. The overruling of your motion is not grounds for appeal because you can't appeal the overruling on Motion for Summary Judgment. In other words, I think the issue has been fairly presented by you all, and simply to me are matters of law. And I think this is something you addressed previously and agreed to tie in and address these issues. In the first instance, to prevent having to go forward with any evidence in the event that I found that the judgement was not void, that it was valid. So, having found that your motion should be overruled, I think as a matter of law pursuant [p. 9] to Rule 13, I then find that Mr. Pearce, the defendant, is, in fact, entitled to judgment under Rule 13. Having made that finding, it would make it an appealable order.

MR. MALLOY: Did You –?

MR. BERNBAUM: Not necessarily, I would like to call something to the Court's attention. The decision that the Court has made today does not end the case because, and I'm sure the Court is aware, that Monica McCabe is claiming title to a 20-acre tract, and this judgment

involves an acreage of less than 20 acres. So, there are still issues involved here.

THE COURT: I'm just saying for purpose of determining whether you have an appealable order, my overruling your motion is not appealable regardless of whether you take the position of it is a final judgment or not. So, I –.

MR. MALLOY: I'm glad Ron mentioned that. That does create, I think, a factual issue still in this case which is not determined by the Motion for Summary Judgment with respect to the void judgment. That's because the judgment, whether it be void or valid, does not effect the five acres.

Isn't that the point you're talking about, Ron?

MR. BERNBAUM: That's correct.

MR. McGOWAN: However, let me point this out though. As to Mr. Pelizzoni and Lewis and as to P&L, our Motion for Summary Judgment will be predicated upon this ruling because [p. 10] in point of fact, we never claimed an interest in anything other than the north half lying north of Bird Creek. Never did we put a well any place other than that portion of the property lying north of Bird Creek.

THE COURT: I assume that they are referring to Pearce as –.

MR. McGOWAN: Listen, I don't represent Pearce, Your Honor, he may have other problems in this case. He may have problems concerning the judgment. That is not my problem. My problem is, or the issue that confronts this Court as far as my clients are concerned is we are

sued for converting oil and trespassing upon the property that Your Honor has just found, in fact, was owned by Pearce at the time the leases were given by virtue of your Court's upholding the validity of the 1978 Quiet Title Judgement. Now, we can bring this to an appealable issue on that basis without any difficulty at all.

THE COURT: I think the question that has to be addressed is whether the other five acres is involved as far as your clients against Lewis and Pelizzoni.

MR. BERNBAUM: It is.

MR. McGOWAN: How is that possible?

MR. BERNBAUM: I'll tell you. Because if, in fact, the Judge's decision stands, and it's not appealable, then your clients became co-tenants with my clients. And you have co-tenant liability.

[p. 11] MR. McGOWAN: Mr. Bernbaum, we never took a lease on the other five acres.

THE COURT: Well, I think the only thing I can do as far as this is concerned is determine that your Motion for Summary Judgment be overruled.

And your motion should be granted on behalf of Lewis and Pelizzoni.

As far as Lewis Pearce is concerned, he's involved in this still. So, neither here nor there as far as he's concerned.

I assume it will have some effect if he were to urge a Motion for Summary Judgment.

MR. McGOWAN: Somebody named Hampton.

THE COURT: He was in the previous proceeding.

MR. BERNBAUM: Your Honor is saying that the Motion for Summary Judgment filed by Pelizzoni and Lewis is the – Is that Summary Judgment appealable?

MR. McGOWAN: Absolutely correct.

MR. MALLOY: Is that what you're saying?

THE COURT: I don't think that's my decision to make. I'm saying you cannot appeal from the overruling of a Motion for Summary Judgment. You can if a Motion for Summary Judgment is sustained, and it's a final judgment.

MR. MALLOY: Don't you agree with this? If you get an order which would logically follow from your sustaining of their Motion for Summary Judgment, then a judgment on that [p. 12] certainly is an appealable order.

MR. BERNBAUM: I think it is.

MR. McGOWAN: Let me clarify one thing. The Court is at this time sustaining the Motion for Summary Judgment filed on behalf of Pellizoni and Lewis? Is that what you are saying?

THE COURT: I hope that's what I just stated. I believe that's what I just stated.

Now, as far as your Motion to Dismiss is concerned.

MS. FRANSEIN: Yes, Your Honor. We have no interest whatsoever. We have disclaimed interest in this property. We are not necessary or proper parties to be sued in this matter.

THE COURT: Mr. Bernbaum, in regard to your claims against Ms. Fransein's clients, is there any claim other than the Quiet Title against them?

MR. BERNBAUM: The judgment and the – No, I think it would be for vacation of judgment in Quiet Title. There's no claim besides that that I'm aware of.

THE COURT: I think, based on the ruling that I've just made, that any participation you may have had in the previous proceeding, that is in the 1978 case, is not void. I think it relieves you of any liability for that. I don't know if you call it sustaining a Motion to Dismiss or finding that you're entitled to judgment as a matter of law.

[p. 13] MR. BERNBAUM: I'd like the record to reflect that the plaintiff takes exception to all the rulings that the Court makes today.

THE COURT: I don't think you formally have to do that.

MR. BERNBAUM: I want to do it anyway.

MR. MCGOWAN: Don't blame you.

THE COURT: Off the record.

(whereupon discussion was had off the record)

THE COURT: Let the record reflect that as far as the defendant's Motion to Dismiss is concerned that having considered other items outside the pleadings presented, that pursuant to the Section 2012 of the Pleading Code, I will treat as a Motion for Summary Judgment. Particularly because it involves issues of law that the Court considered in regard to the plaintiff's Motion for Summary Judgment.

The Court further finds that the defendant's Motion being treated as a Motion for Summary Judgment be sustained and judgment should be entered in favor of the Board of County Commissioners and County Treasurer.

CERTIFICATE

STATE OF OKLAHOMA, )
) ss:
COUNTY OF TULSA. )

I, TONYA M. BOWEN, a Certified Shorthand Reporter in and for the State of Oklahoma do hereby certify that the foregoing is a true and correct record of my notes taken in Case Number CJ 85-4803, on the 14th day of November, 1986.

I further certify that I am not related to nor Attorney for either of said parties, nor otherwise interested in the outcome of said cause.

WITNESS MY HAND AND SEAL this 24th day of November, 1986.

/s/ Tonya M. Bowen
Tonya M. Bowen, CSR